

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JEREMIAH K. CLARK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

DECISION AND ORDER

08-CV-387S

03-CR-18S

Presently before this Court is Petitioner's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. (Docket No. 110.¹) Petitioner claims, among other things, that he received ineffective assistance of counsel when his lawyer failed to perfect a timely appeal before the United States Court of Appeals for the Second Circuit. The government concedes that Petitioner received ineffective assistance of counsel. Petitioner's Sixth Amendment right to counsel has therefore been violated. See McHale v. United States, 175 F.3d 115, 119 (2d Cir. 1999) (holding that a government concession of "constitutionally deficient assistance" establishes a Sixth Amendment violation).

The appropriate remedy in this situation is to deny Petitioner's § 2255 motion without prejudice and appoint new counsel for Petitioner who can then move for the Second Circuit to recall its Mandate and permit Petitioner to pursue and perfect his direct appeal. See McHale, 175 F.3d at 117, 119-20 (holding that the appropriate remedy when a timely appeal has been filed but not perfected is for the Second Circuit to recall its

¹All docket references are to the criminal case, 03-CR-18S, where all docketing occurred.

Mandate dismissing the appeal and permit the petitioner to proceed with his or her direct appeal); Pelt v. United States, Nos. 08-CV-758A, 04-CR-213A, 2009 WL 1272272 (W.D.N.Y. May 6, 2009) (denying § 2255 without prejudice under McHale and appointing new counsel).

IT HEREBY IS ORDERED, that Petitioner's Motion to Vacate (Docket No. 110) is DENIED without prejudice.

FURTHER, that the Federal Public Defender's Office is hereby assigned to represent Petitioner on appeal for purposes of filing a motion for the Second Circuit to recall its Mandate under McHale.²

FURTHER, that the Clerk of Court is directed to send a copy of this Decision and Order to the Federal Public Defender.

FURTHER, that the Clerk of Court is directed to close 08-CV-387S.

SO ORDERED.

Dated: September 30, 2011
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
Chief Judge
United States District Court

²This Court notes that Kimberly Schechter of the Federal Public Defender's Office previously represented Petitioner until he retained counsel on January 21, 2005.